

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 318 of 2000****For Approval and Signature:****HONOURABLE MR.JUSTICE C.K.BUCH**

=====

1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
?

=====

JAGDISHBHAI DHULABHAI PATEL - Appellant(s)**Versus****STATE OF GUJARAT - Opponent(s)**

=====

Appearance :

MR HR PRAJAPATI for Appellant(s) : 1,
MS DARSHANA PANDIT, ADDL. PUBLIC PROSECUTOR for Opponent(s) : 1,

=====

CORAM : HONOURABLE MR.JUSTICE C.K.BUCH**Date : 25/04/2007****ORAL JUDGMENT**

1. The present appeal against the order of conviction and sentence passed by the ld. Special Judge, Nadiad dated 13.03.2000 in EC Case No.17/1993

whereby the ld. Judge held the appellant accused guilty of the charge of the offences punishable under section 7(1)(A)(2) read with 3 of the Essential Commodities Act, 1955 (hereinafter referred to as the EC Act). The accused is asked to undergo R/I for 3 months and to pay a fine of Rs.5000/ I/d to further undergo S/I for 1 month.

2. Mr. Prajapati, ld. Counsel appearing for the appellant accused and ld. APP Ms. Darshana Pandit has taken me through the basic case of the prosecution and the entire evidence led during the course of trial. Mr. Prajapati has submitted that though the accused has assailed the legality and validity of the order of conviction and sentence on various grounds mentioned in the memo of the appeal, he would concentrate mainly on four grounds which are relevant and it is possible for this Court to quash and set aside the impugned judgment and order of conviction and sentence without entering into the discussion of remaining grounds. The ld. Trial Judge has ignored the defence as emerged from the evidence led by the prosecution and according to Mr.

Prajapati, the ld. Trial Judge has failed in ignoring the basic version of the defence plea and also the explanation given by the accused under section 313 of CrPC.

3. To appreciate the rival contentions, firstly it would be proper for the Court to state the case of the prosecution in brief:-

(i) It is alleged that a petrol pump of the accused running in the name and style of M/s Arvind Bhailalbai & Company situated at Vasad Chokdi of town Borsad, was inspected on 18.09.1993 by the Inspecting Team headed by Mr. MN Mehta, Assistant Director of Civil Supplies, Gandhinagar and samples from different tanks viz. two different samples from High Speed Diesel (HSD for short) storage tanks of the accused were drawn. Initially examination of density popularly known as "density test" was carried out by the inspecting team. After drawing of the sample and difference was found within the permissible limits so far as HSD is concerned. Obviously therefore, there was no seizure or sealing of diesels tank on the date of inspection i.e.

18.09.1993. However, the samples were sent for analysis. FSL Expert examined HSD to ascertain the density at 15 degree Centigrade and the difference was found as 0.0030 which is more than the prescribed limit under The Motor Spirit High Speed Diesel (Prevention of Malpractice in Supply & Distribution) Order, 1990 (hereinafter referred to as Order of 1990 for short). When the density was tested on the spot after drawing the sample from first HSD Tank, the density was found 0.8416 and the density of the sample drawn from second HSD tank was found 0.8418. The limit prescribed by the Order of 1990 is 0.8450. So, for one sample, i.e. sample drawn from second HSD tank, the difference was found 0.0002 which was more than the permissible limit of 0.0032. Therefore, it was decided to file the complaint alleging that the accused was found storing and selling HSD of inferior quality. Order of 1990 is issued under section 3 of the EC Act and, therefore, the say of the prosecution is that violation of the above said Order of 1990 is an offence punishable under section 7 read with section 3 of the EC Act. Therefore, the complaint came to be filed and after conclusion of the trial,

the appellant accused came to be convicted vide impugned judgment as aforesaid.

4. The order of conviction is based mainly on the deposition of Mr. NM Mehta, Assistant Director -PW No.1 examined at exh.5 and the report of FSL which is at exh.14. Eh.14 has been received in evidence during the deposition of PW No.1 Mr. Mehta.

5. The first point submitted by ld. Counsel Mr. Prajapati is that the ld. Trial Judge ought to have given the benefit of doubt to the accused as difference was negligible i.e. of only 0.0002 in the density and that too in a case where the difference was found within the permissible limit at the time of initial examination carried out by the Inspecting team and there was no positive opinion in favour of the prosecution qua the diesel taken out as sample from the diesel tank No.2. Second point argued by ld. Counsel Mr. Prajapati is that under the provisions of the Order of 1990, sampling of the product is prescribed vide clause-8 of the Order of 1990 and the ld. Trial Judge appears to have ignored the mandatory scheme for drawing of sample. It clearly

provides that the sample if drawn should be of 750 ML to 1000 ML (1 litre)of each product. So, from both the diesel tanks, 750 ML diesel ought to have been drawn. It is in evidence of one of the prosecution witnesses examined that no bottle wherein 750 ML diesel can be collected and sealed, but diesel in 500 ML quantity was collected and sealed. This violation goes to the root of the case of the prosecution. The third point argued by Mr. Prajapati is that as per sub-clause 3 of clause (8) of the Order of 1990, authorities were obliged to collect the sample either in clean glass bottle or in aluminum container. This clause clearly prohibits the use of plastic container and it provides that plastic container "shall not be used for drawing a sample". This prohibitory clause makes the first part of sub-clause (3) mandatory and, therefore, non-compliance of the sub-clause (3) of clause (8)of the Order of 1990 would also affect the genuineness and legality of the drawing of a sample. It is settled, according to Mr. Prajapati that under various laws, when sample drawing procedure is considered to be very important and vital, the authority should draw the sample as per the rules

framed under the law in this regard. So, this would also go against the prosecution. It is submitted that it is in evidence of panch witness Punambhai Chaturbhai examined vide exh.22 that the bottles were affixed by applying plastic cap and thereafter, samples were sealed meaning thereby that at least the cap of bottles were applied by the cap made of plastic and there is no convincing evidence to show that the containers were either of glass bottle or of aluminum container. PW No.4 has stated that bottles were glass bottles and it is also reflected in the panchanama. However, neither Mr. Mehta nor Mr. Patel i.e. PW Nos. 1 & 3 respectively have stated this fact in their deposition. Of course, in the same way, a responsible prosecution witness namely Supervisor of Civil Supplies department namely PW 3 Hirabhai Ranchhodbhai Patel has accepted that the containers were not cleaned with liquid which was required to be collected as sample in that particular container, meaning thereby that if petrol sample is to be drawn and is to be poured and sealed in a container, the sample drawing authority firstly should clean the bottle with very petrol and after taking out firstly

poured petrol, the procedure of collecting the sample should be undertaken. When a responsible witness has not said that such a procedure was followed and, therefore, it was not safe for the Court to link the accused with the crime especially when the difference in density was of only 0.0002 and hence the ld. Trial Judge has erred in convicting the accused.

6. To appreciate the say of Mr. Prajapati and ld. APP Ms. Pandit who vehemently supported the impugned judgment, the Court would like to reproduce the clause relating to sampling of the product under Order of 1990 which is mentioned by the appellant in the memo of appeal:-

8. Sampling of product:

- (1) The officer authorized in clause 7 shall draw the sample from the tank, nozzle, vehicle or receptable as the case may be to check whether density of the product conforms to the requirements indicated in Schedule:I.
- (2) The officer authorized in clause 7 shall take sign and seal three samples of 750 ML to 1 Litre each of the product, one to be given to the dealer, transporter or concerned person under acknowledgment with

instructions to preserve the sample in his safe custody till the testing/investigations are completed, the second sample to be kept by the concerned oil company or department and the third to be used for laboratory analysis.

- (3) Sample shall be taken in clean glass or aluminum containers (plastic container shall not be used for drawing samples).
- (4) The sample label should be jointly signed by the officer who has drawn the sample and the dealer or transporter or concerned person or his representative and the label shall contain information as regards the product, name of retail outlet, quantity of sample, date, name and signature of the officer, name and signature of the dealer or transporter or concerned person or his representative.
- (5) The authorized officer shall send the third sample of the product taken under sub-clause (2) within 10 days to any of the Schedule III appended to this order for analysis with a view to checking whether density of the product conforms to requirements indicated in Schedule:I. "

7. There is enough force in the arguments of Mr. Prajapati, ld. Counsel appearing for the appellant accused that the scheme of clause (8) referred to herein above is mandatory and when it was mandatory for the authorized officer to take three samples of 750 ML to 1 Litre each, the sample taken of 500 ML of the product is likely to result into serious prejudice to the accused. In the same way, the use of

plastic cap on the bottle also would affect the laboratory finding otherwise the law framers ought not to have put an embargo specifically as to the use of plastic in collecting and storing the HSD or petrol. When the difference was very negligible and the difference in density was found otherwise within the prescribed limit, the accused ought not to have been even prosecuted. The ld. Trial Judge has grossly erred in appreciating the evidence keeping in mind the basic case of the prosecution that was placed in the nature of complaint and opinion of FSL expert.

8. It is not necessary to refer to any judgment as the above-quoted clause (8) of the Order of 1990 is self-speaking. After all, the Court was dealing with a sample of a petroleum product-a highly sensitive material which can have a direct impact if any rubber or plastic is used in the procedure of collecting and sealing the sample. The Court is of the view that the ld. Trial Judge has grossly erred in not appreciating all relevant aspects before accepting the bare words of PW 1 -FSL Expert. Such an order of conviction can not sustain in the eyes of law. So,

the arguments advanced by ld. Counsel Mr. Prajapati for the appellant accused are accepted and consequently, the resistance placed by the ld. APP Ms. Pandit is rejected.

9. In the result, the present Criminal Appeal is hereby allowed. The impugned judgment and order of conviction and sentence passed by ld. Special Judge, Nadiad in EC Case No.17/1993 is hereby quashed and set aside. The appellant accused is hereby acquitted of the offences for which he came to be convicted and sentence vide impugned judgment. Fine, if paid, be refunded to the appellant accused on proper identification. The appellant accused is on bail and his bail bonds stand canceled.

[C.K. BUCH, J]

*rawal